1-28-1976

William Sloan v. Commonwealth of Kentucky

Reply Brief 1974-SC-1070

REPLY BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 74-1070

WILLIAM SLOAN — APPELLANT

VS. — APPEAL FROM FAYETTE CIRCUIT COURT
HON. L. T. GRANT, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief for Appellant has been mailed, postage prepaid, to Hon. L. T. Grant, Judge, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky 40507; Hon. Patrick H. Molloy, Commonwealth Attorney, 22nd Judicial District, Lexington, Kentucky 40507; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 23rd day of January, 1976.

J. Vincent Aprile II

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* *

MAY IT PLEASE THE COURT:

The purpose of this reply brief is to respond to the arguments raised in the brief filed by the appellee in the above-captioned action.

QUESTIONS TO WHICH REPLY BRIEF ADDRESSED

I.

DID THE TRIAL COURT'S OVERRULING OF APPELLANT'S RENEWAL OF HIS MOTION FOR A CONTINUANCE CONSTITUTE AN ABUSE OF DISCRETION AND DENY APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL?

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ARGUMENTS

I.

THE TRIAL COURT'S OVERRULING OF APPELLANT'S RENEWAL OF HIS MOTION FOR A CONTINUANCE CONSTITUTED AN ABUSE OF DISCRETION AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

In response to this assignment of error, appellee initially asserts that the "granting or refusing of a continuance in a criminal case rests largely in the sound but not absolute discretion of the trial court," citing 22A Corpus Juris Secundum §482 (Appellee's Brief, p. 22). Significantly, appellee has neglected to present the more relevant aspect of the majority rule concerning continuances which is also enunciated in 22A Corpus Juris Secundum §482:

> The discretion of the court as to continuances is not absolute, however; it must be exercised in conformity with the law of the land, and established rules of practice. It should not be exercised arbitrarily or capriciously, nor in disregard of the fundamental rights of accused; it does not authorize the court to refuse a contiuance when the circumstances disclose a condition of affairs showing that justice to accused entitles him to a postponement of his trial, and a continuance should always be granted on a sufficient showing.

Appellee next suggests that the voir dire of the prospective jurors constituted "sufficient protection" against widespread adverse pretrial publicity (Appellee's Brief, p. 23).

In examining the methods available to assure an impartial jury where prejudicial publicity has permeated the community, the Supreme Court in Groppi v. Wisconsin, 400 U.S. 505, 91 S.Ct. 480, 27 L.Ed.2d 571 (1971), specifically stated that voir dire of the potential jurors "is not always adequate to effectuate the constitutional guarantee." Id., 91 S.Ct. at 493.

When a criminal defendant alleges that pretrial publicity precluded a trial consistent with standards of due process, it is the duty of a reviewing court to undertake an independent evaluation of the facts established in support of such an allegation. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Calley v. Calloway, 519 F.2d 184 (5th Cir. 1975). The traditional measure of undue prejudice required that a clear nexus between community prejudice and jury opinion be demonstrated. Under such a test, it would have been necessary for appellant to show that community prejudice had in fact invaded the jury box. More recent Supreme Court cases, however, hold that evidence of pervasive community prejudice dispenses with the requirement that actual jury prejudice be shown. See Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Estes v. Texas, 381 U.S. 532, 85 S.Ct. 546, 13 L.Ed. 2d 543 (1965).

In United States ex rel Doggett v. Yeager, 472 F.2d 229 (3rd Cir. 1973), the Third Circuit Court of Appeals recognized that actual prejudice need not be shown where there existed widespread pretrial publicity:

> Not only is it no longer necessary that a defendant show that the jury actually was prejudiced, since Rideau it is not necessary to show that the prejudicial material actually reached the jury, and thus infected the trial. If the information was prejudicial and the dissemination widespread in the community from which the jury was drawn, the defendant is entitled to relief. Id., at 238.

In ordering the state to afford the defendant in the cited case a new trial, the court delineated the due process test to be applied where prejudicial pretrial publicity is alleged:

> Due process requires that Doggett be afforded a new trial because there was a substantial likelihood that the contents of the newspaper accounts making reference to his retracted guilty plea and to an alleged escape attempt came to the attention of the jurors who deliberated. Id., at 239 (emphasis added).

The amount of exposure which is required before reversal is required is minimal in nature. Even if only one juror was exposed to this prejudicial publicity, this court is constitutionally required to order a new trial. As the Supreme Court explained in Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), an individual is constitutionally "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." Id., 87 S.Ct. at 471.

During the voir dire of the prospective jurors in the case at bar, forty-five veniremen were called (T.E., Vols. II, III, pp. 9-170). All of the potential jurors acknowledged that they had either read, seen or heard about the instant case. Twenty-five (or fifty-five percent) of the veniremen called admitted that they had formed or expressed an opinion about the guilt or innocence of appellant (e.g., Vol. II, pp. 11, 13, 33-36, 42-44, 49-51, 52-55, 102, 111-112, 120, 150, Vol. III, p. 151).

Fourteen potential jurors stated that they could not set aside their previously formed opinions concerning appellant's guilt or innocence (T.E., Vol. II, pp. 12, 101, 102, 103, 120, 136, 137, 149, 150, 150A; Vol. III, p. 151). Ten of the veniremen called asserted that they could set their previous opinions of appellant's guilt or innocence aside and decide the case upon the evidence presented at trial and the applicable law (e.g., T.E., Vol. II, pp. 24, 33-36, 42-44, 49-51, 52-55, 111-112; Vol. II, p. 152).

While the results of voir dire examination are an important factor in gauging the depth of community prejudice, see Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963), continual protestations of impartiality from prospective jurors are best met with a healthy skepticism from the bench. Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966).

There are two distinct difficulties inherent in the use of the voir dire of potential jurors to "protect" an accused against community hostility and adverse pretrial publicity. First, there is always the problem of obtaining accurate answers on voir dire -- is the juror consciously or subconsciously harboring prejudice against the accused resulting from the widespread news coverage in the community. The second difficulty is that when disposition of a motion for change of venue or continuance turns on the results of the voir dire, defense counsel may be placed in an extremely difficult position. Knowing conditions in the community, he may be more inclined to accept a particular juror, even one who has expressed an opinion, than to take his chances with other, less desirable jurors who may be waiting in the wings. And yet to make an adequate record for appellate review, he must object as much as possible, and use up his peremptory challenges as well. This dilemma seems both unnecessary and undesirable. See American Bar Association, Standards Relating to Fair Trial and Free Press, Commentary to §3.2.

The voir dire of the potential jurors in the case sub judice demonstrates that Fayette County had been saturated with pretrial publicity. The quantity of media reports assembled by appellant demonstrates that his case was the subject of an excessive amount of adverse pretrial publicity (see Defense Exhibits 3 and 4). Furthermore, the evidence of the pervasive

feeling of hostility against appellant in both Fayette County and the state of Kentucky is reflected in the numerous petitions and letters which were circulated throughout the state in an effort to compel the governor to reinstate the death penalty in time to permit that punishment to be inflicted on appellant and Wilmer Scott (see Petitions and Letters, Defense Exhibit 2). Parenthetically, it should be noted that the majority of the people signing the petitions to the governor indicated that they resided in Lexington, Kentucky.

Relying heavily on the antiquated opinion in Carsons v. Commonwealth, 243 Ky. 1, 47 S.W.2d 997 (1932), appellee argues that the trial judge's discretion in overruling a motion for continuance based on adverse public sentiment and hostility should not be reviewed on appeal (Appellee's Brief, pp. 23-24).

However, as early as 1933, this court in Miller v. Commonwealth, Ky., 248 Ky. 717, 59 S.W.2d 696 (1933), recognized that "[i]t is axiomatic that in. . .[extremely hostile] environments, . . .any jury composed of individuals with the common nature of the average man could, and inevitably would, sense the presence of the pervading hostile influences of the locality of the trial, and unconsciously be controlled unduly in the consideration of the evidence adduced, and in reaching its verdict, to such a degree as will prevent, at its hands, that character of fair and impartial trial which the law undertakes to guarantee to secure to every person accused of crime." Id., 59 S.W.2d at 972. In Miller this Court held that the trial judge abused his discretion when he overruled the defendant's motion for a change of venue. Id.

Appellee argues that this Court's opinion in Garr v. Commonwealth, Ky., 463 S.W.2d 109 (1971), "dealt with the same variety of publicity as that" found in the case at bar (Appellee's Brief, p. 27). Despite appellee's assertions to

the contrary, an analysis of the Garr case reveals that neither the caliber nor the quantity of the pretrial publicity in the Garr case approximated the prejudicial publicity in appellant's case. Furthermore, the Garr case dramatically lacked the other indicators of community hostility and prejudice which were manifest in appellant's case.

In Garr, supra, this Court acknowledged that "[t]here was front-page newspaper coverage of the discovery of" the victim's body. Additionally, according to this Court, "[t]he newspaper accounts noted some of the incriminating evidence against the appellant, coupled with the efforts of the police department to locate him, and included a somewhat detailed account of the circumstances surrounding his discovery" in Florida. Id., at 111.

In fact, this Court's enumeration of the pretrial publicity in Garr irrefutably establishes that the media coverage and community hostility against Garr could not be equated with the prejudicial publicity and public resentment found in the case sub judice.

It must be remembered that the defendant in Garr moved for a change of venue and argued that "it was impossible for a jury to be drawn from the citizens of the county or any adjoining county who would not be affected by information received by them out of the courtroom and before the trial." Id., at 111. In other words, the defendant in Garr conceded that the pretrial publicity concerning his case was only local in nature and that a fair trial could be secured in a county more distant from the locale of the alleged crime. In contrast, appellant in the case at bar noted that the adverse media coverage in his trial had saturated the entire state and, consequently, had rendered a

continuance -- not a change of venue -- the only appropriate method for obtaining a fair trial.

Significantly, this Court ruled in Garr that "[t]here was no evidence reflecting that public opinion in Fayette County was so aroused, as to preclude appellant's having a fair trial." Garr v. Commonwealth, supra, at 111. The motion for continuance in appellant's case was predicated on extensive pretrial publicity, antagonistic letters and petitions to the governor about appellant, and extreme security precautions to protect appellant's life. These factors indicate that public opinion was so aroused as to preclude appellant's right to a fair trial in April of 1974.

In evaluating the merit of appellant's motion for continuance, this Court should note that, after his apprehension, appellant was removed from Pendleton County and incarcerated at the Kentucky State Penitentiary in Eddyville, Kentucky pursuant to KRS 441.050 (T.E., Vol. I, pp. 23-26). In Manning v. Commonwealth, Ky., 346 S.W.2d 755, 757 (1961), this Court noted:

> The inconsistency in the denial of the change of venue is hard to understand in view of the requirements to be met under KRS 441.050 before a person charged with a crime may be removed to the state penitentiary for safekeeping. The statute requires a finding that " * * * there exists threatened violence or intense feeling and public indignation against * * *" an accused before the circuit judge may order his removal for safekeeping.

There is a similar inconsistency in keeping appellant incarcerated at the state penitentiary under KRS 441.050 until his trial date and refusing to grant his continuance based on adverse pretrial publicity and community hostility.

The motion for continuance lodged in the case at bar was heavily documented with specific instances of adverse and prejudicial media coverage of both the alleged crimes and appellant's suspected involvement (see Defense Exhibits 3 and 4). Evidence detailing media coverage has long been recognized as "competent evidence" in support of a motion for continuance. Carsons v. Commonwealth, 243 Ky. 1, 47 S.W.2d 997 (1931); Hurley v. Commonwealth, Ky., 451 S.W.2d 838, 840 (1970).

Appellee has conveniently declined to address the specific examples of prejudicial pretrial publicity and community hostility delineated in appellant's initial brief (Appellant's Brief, pp. 15-20). Such an approach by appellee does little to assist this Court in exercising its "duty to make an independant evaluation of the circumstances" of the pretrial publicity to determine whether appellant's right to a fair trial was denied. Sheppard v. Maxwell, supra, 384 U.S. at 362. Appellee has obviously failed to meet its burden on this issue.

In conclusion, appellant contends that he was, based upon both federal and state decisions, constitutionally entitled to the requested continuance to avoid the hostile climate generated by the excessive pretrial publicity. Consequently, under the facts and circumstances of this case, the denial by the court below of the requested change of venue constitutes an abuse of discretion which denied appellant his constitutional right to a fair trial.

II.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION FOR A SEPARATE TRIAL ON THE CHARGES CONTAINED IN COUNTS NUMBERED 1, 2, 3 AND 4 OF INDICTMENT NO. 73-C-416.

Appellee initially argues that counts numbered 1, 2, 3 and 4 of the indictment were properly joined for trial with counts numbered 5, 6, 7, 8, 9, 10 and 11 because "the series of actions were both similar in character and constituted parts of a common scheme or plan" (Appellee's Brief, p. 36). But certainly the three charges of murder and the one charge of rape alleged in the latter seven counts of the indictment are dramatically different in "character" than the three charges of armed robbery and one count of housebreaking alleged in the initial four counts of the indictment. Despite appellee's purple prose description of the crimes allegedly perpetrated by appellant, both logic and law dictate that the crimes of murder and rape are inherently dissimilar to the offenses of armed robbery and housebreaking.

Appellee's second contention that "the series of actions . . . constituted parts of a common scheme or plan" is equally indefensible. In an effort to establish the semblance of a common scheme or plan, appellee asserts that appellant and Wilmer Scott "were intent on the goal of successfully escaping to Ohio" (Appellee's Brief, p. 36). Appellee's argument relies on a blatant oversimplification of the concept of common scheme or plan. Utilizing appellee's line of analysis, a defendant could be prosecuted at one trial for the offenses of armed robbery, grand larceny, burglary, forgery and fraudulent concealment of mortgaged property, even though each offense was committed on a different date and against a different victim, simply because each alleged crime was part of the defendant's

"common scheme or plan" to accumulate illegally a large sum of money.

In an endeavor to justify the joinder of all eleven of these counts in the same indictment, appellee has elected to stress the concept of "transaction" as used in RCr 6.18. In Cateneo v. United States, 167 F.2d 820 (4th Cir. 1948), a case cited by appellee, the court ruled that "[a]ll of the criminal activities" alleged against the defendants "relate to, and are logically and intimately connected together with" what "is in reality" only "one transaction" -- the draft deferment of one of the defendants. The court emphasized that "[t]he deferment" of the one defendant was "the goal of all the activities" alleged in the indictments. In the cited case the charged offenses, making false affidavits and false statements, have no logical purpose independent of the goal of securing a draft deferment for one of the defendants. On the other hand, the eleven charges in appellant's case suggest no such single unifying principle which could possibly give direction and meaning to each of the eleven separate acts.

Appellee's attempt to liken the joinder issue in Brown v. Commonwealth, Ky., 458 S.W.2d 444 (1970), to the fact situation in the case sub judice is unpersuasive. In Brown the trial involved four charges: an armed robbery of a business on October 31, 1968; an armed robbery of a different business establishment on November 9, 1968; the carrying of a concealed deadly weapon on November 10, 1968; and an escape from custody on November 13, 1968. This Court in Brown noted that "the trial judge found at the outset of the trial that the offenses were of the same or similar character or were based on transactions

connected together." Id., at 447. However, this Court in Brown upheld that ruling by the trial judge only after viewing "what subsequently occurred after the consolidated trials went forward." Id. It should be noted that in Brown the jury convicted the defendant of only the October armed robbery and the crime of carrying a concealed deadly weapon. The prosecution near the conclusion of the trial withdrew the escape charge and the jury could not agree on the accused's guilt of the November armed robbery. In view of this outcome, this Court could not "say an abuse of discretion occurred" or that the accused was "embarrassed or confused" in making his defense. Id., at 447.

Of course, in the case at bar, the prosecution withdrew none of the counts and appellant was convicted of a crime under each of the eleven counts. Accordingly, the results in appellant's case do not serve to mitigate the prejudicial effects of the improper joinder and joint trial of all eleven counts of the indictment.

Appellee cites additional cases "[i]n support of the proposition that transactions similar to the instant case could be joined together" (Appellee's Brief, p. 37). These cases demand closer scrutiny. In Dye v. Commonwealth, Ky., 477 S.W.2d 805 (1972), one of appellee's supporting cases, the defendant was tried and convicted at a single trial of the murder of his sister-in-law, the wounding of his brother-in-law and the shooting at without wounding a third person. All three crimes allegedly occurred on the same day at the same place within a space of minutes as the accused attempted to force his wife to leave with him. Under such circumstances, this Court found "the offenses were based on the same acts or transactions connected together." Id., at 807. The factual

situation in the Dye case is obviously not compatible with the circumstances of the instant case where the first four counts of the indictment occurred at an entirely different location and against different victims from the latter seven counts.

Appellee also relied on the decision in Watkins v. Commonwealth, Ky., 514 S.W.2d 185 (1974), where this Court noted that under RCr 6.18 it would be proper to join two counts of forcible rape in one indictment where both offenses allegedly were committed on the same day against the same victim. Here again the factual disparity between the crimes involved in the case at bar suggest that the Watkins decision has no applicability to this assignment of error.

In Marcum v. Commonwealth, Ky., 390 S.W.2d 884, 886 (1965), another of appellee's case, this Court had "no difficulty in deciding that the offenses for which appellant was tried were similar." The offenses in Marcum all involved violations in the operation of an automobile and "the whole sequence of events. . .could have been considered one integral crime." In view of those facts, the Marcum case can be assigned little persuasive value in deciding the merit of the assigned error.

Even if this Court should rule that counts 1, 2, 3 and 4 were properly joined in the indictment with counts 5 through 11, such a ruling does not mandate a finding that a joint trial of all eleven counts is permissible. "The bare fact that two or more counts are joined in a single indictment under RCr 6.18 or could be consolidated for trial under RCr 9.12 does not require or even permit a joint trial of counts under all circumstances." Russell v. Commonwealth, Ky., 482 S.W.2d 584, 587 (1972). RCr 6.18 "is concerned only with the composition of an indictment and not with a trial of the offenses charged." Id.

In a maneuver calculate to minimize the validity of this assigned error, appellee contends that "the granting or denial of a severance of offenses charged against the defendant is . . . within the discretion of the court" (Appellee's Brief, p. 37). Nevertheless, the "[g]ranting of severance, vel-non, is a matter within the sound discretion of the trial court." Davis v. Commonwealth, Ky., 464 S.W.2d 250, 252 (1970). As stated in Hardin v. Commonwealth, Ky., 437 S.W.2d 931, 933:

> If it appears that a defendant or the Commonwealth will be prejudiced by a joinder of offenses or defendants for trial, RCr 9.16 requires the trial court to grant separate trials or provide whatever other relief justice necessitates.

Appellee concedes that "the admissibility of evidence is a factor to be considered" in determining whether a joinder of offenses for trial is prejudicial, but argues that "it will be outweighed if the events are so interwoven that to prove one count, evidence of another count would have to come in" (Appellee's Brief, p. 38). Although appellee cites Rigsby v. Commonwealth, Ky., 495 S.W.2d 795 (1973), in support of this proposition, that principle is never advanced in the cited case. Furthermore, in Rigsby, the charges of murder, armed robbery and rape involved a period of two hours in which the two defendants and an accomplice came upon two teenaged couples, robbed the boys and raped the girls. After taking the girls from the scene of the robbery, the defendants argued with the accomplice and fatally shot him. Under those circumstances, all of the charged offenses are clearly part of "a common scheme or plan." The factual pattern in Rigsby cannot be equated to the separate incidents which involved two distinct set of victims, two different locales, and extremely different types of offenses.

Appellee has attempted to clarify the issue of joinder by analyzing the decision in United States v. Vanscoy, 482 F.2d 347 (10th Cir. 1973) (Appellee's Brief, pp. 39-40). However, in the cited case, the accused was charged with robbing a bank and with being an accessory after the fact of the same robbery. The court, in rejecting the claim of prejudicial joinder, noted that the defendant "could not be convicted of both bank robbery and being an accessory after fact." Id., at 349. Faced with no possibility of being convicted of both offenses, the defendant in Vanscoy failed to demonstrate any prejudice flowing from the joinder of both counts for trial.

Appellee has also argued that appellant's interpretation of Cross v. United States, 335 F.2d 897 (D.C. Cir. 1964), is "entirely too broad" (Appellee's Brief, p. 44). However, that interpretation was adopted by this Court in Rigsby v. Commonwealth, supra, at 798.

Appellee argues that the Cross rationale is inferior to the position delineated in Baker v. United States, 401 F. 2d 958 (D.C. Cir. 1968). Appellate counsel for the Commonwealth, although quoting extensively from the Baker opinion, has specifically omitted the following excerpt from the section he cited:

> The essence of our ruling in Cross was that, because of the unfavorable appearance of testifying on one charge while remaining silent on another, and the consequent pressure to testify as to all or none, the defendant may be confronted with a dilemna: whether, by remaining silent, to lose the benefit of vital testimony on one count, rather than risk the prejudice (as to either or both counts) that would result from testifying on the other. Obviously no such dilemma exists where the balance of risk and advantage in respect of testifying is substantially the same as to each count. Id., at 976.

Obviously, the court in Baker found no reason to differentiate between nine counts of wilfull tax evasion, larceny, interstate transportation of fraudulently obtained funds, assisting another to falsify his income tax return and conspiracy to defraud the government. However, in the case at bar, the first four counts of the indictment alleged three armed robberies and a housebreaking while the latter seven counts charged three murders, a rape, two armed robberies and a housebreaking. When it is remembered that appellant could and did recieve the penalty of life without parole for the rape offense, the reality of appellant's dilemma regarding his decision to take the stand cannot be discounted.

Appellee's reliance on Crampton v. Ohio, 402 U.S. 183, 91 S.Ct. 1454, 23 L.Ed.2d 711 (1971), vacated for other reasons, 92 S.Ct. 2873, 408 U.S. 941, 33 L.Ed.2d 765 (1972), is totally misplaced. The issue presented in Crampton did not in any way involve the question of prejudicial joinder of offenses for trial. The defendant in Crampton challenged only the constitutionality of having his guilt and punishment decided by the jury at a single trial.

Appellee apparently regards the language employed by the Sixth Circuit Court of Appeals in Conte v. Cardwell, 475 F.2d 698 (6th Cir. 1972), as an endorsement of his position on this issue (Appellee's Brief, p. 47). However, since the Conte case involved a habeas corpus proceeding by a state prisoner, the Sixth Circuit could only evaluate the joinder of four counts of prison riot for trial in terms of a due process violation. Utilizing that standard, the court in Conte concluded:

> The offenses charged in each of the four counts of the indictment were sufficiently related both in time and in character to permit their joinder in the indictment and upon the trial. Allegations of participation by the petitioner in successive prison riots in the same institution separated in time by less then two months are sufficient circumstances to permit their joinder in an indictment and in a trial without violation of due process. Id., at 700.

In view of this holding, the court in Conte approached the issue of the infringement of the defendant's right to testify from the perspective that the joinder of all four charges for trial was initially proper. Furthermore, appellee neglected to point out one other salient point that the court in Conte considered in reaching the decision that the joinder was not prejudicial:

> Moreover, the trial court avoided possible prejudice to the petitioner by permitting him to testify regarding the June riot but to decline to testify regarding the August riot, a privilege the Court was not legally impelled to grant. Id., at 700.

In another attempt to refute appellant's argument concerning the limitations on his right to testify, appellee cites the decision in Kirk v. United States, 457 F.2d 400 (6th Cir. 1972), as dispositive of the issue (Appellee's Brief, p. 47). Interestingly, the defendant in the cited case was prosecuted for post office robbery and placing the post office custodian's life in jeopardy by using a dangerous weapon during the robbery. The Court in Kirk stressed that "Title 18, United States Code, Section 2114 is not intended to state two separate offenses, but rather states only a single offense with a more severe penalty when the offense is committed by the use of a dangerous weapon." Id., at 402. Consequently,

it is essential that both aspects of the offense be tried in one proceeding. Improper joinder was never at issue in the Kirk case. Again appellee's precedent on this point seems woefully inappropriate.

Although acknowledging "the substantial savings of judicial time that may be accomplished through a joint trial," the Sixth Circuit Court of Appeals in United States v. Crane, 499 F.2d 1385, 1387-1388 (6th Cir. 1974), emphasized that "judicial economy" can never be the controlling consideration in a criminal trial:

> Yet justice, not judicial economy, is the first principle of our legal system. And under no circumstances may well-intentioned efforts to conserve judicial time be permitted to prejudice the fundamental right of a criminal trial.

Recently this Court in Cargill v. Commonwealth, Ky., 528 S.W.2d 735 (1975), reversed a defendant's conviction due to a joinder of unrelated charges. In the cited case, this Court recognized the principle underlying a decision to sever offenses:

> A person who is charged with the commission of crimes may not always have a perfect trial, but he is entitled to a fair trial. Id., at 737.

It is evident that the trial court's denial of the defense's motion for a severance of offenses constituted an abuse of discretion and denied appellant his right to a fair trial. Accordingly, appellant's conviction must be reversed.

III.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION TO EXCLUDE "LIFE WITHOUT PRIVILEGE OF PAROLE" FROM THE JURY'S CONSIDERATION OF PERMISSIBLE SENTENCES FOR THE OFFENSE OF RAPE ALLEGED IN COUNT NUMBER 8 OF THE INDICTMENT SINCE SUCH A PENALTY FOR THE OFFENSE OF RAPE CONSTITUTES "CRUEL AND UNUSUAL PUNISHMENT" IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Appellee initially argues that as recently as Fryrear v. Commonwealth, Ky., 507 S.W.2d 144 (1974), this Court "held that life imprisonment without privilege of parole for the offense of forcible rape. . .does not constitute cruel and unusual punishment" (Appellee's Brief, p. 49; emphasis added).

However, it must be remembered that the defendant in Fryrear, supra, argued on appeal that "by excepting juvenile offenders from this sentence" this Court is "applying life without parole selectively." Id., at 145. This Court rejected that contention on the basis that the distinction between juvenile and adult offenders "is a rational one." Id., at 146. Obviously, appellant's challenge to the constitutionality of the sentence of life without parole as cruel and unusual punishment is in no way similar to the argument advanced by the appellant in the Fryrear case.

Similarly, appellee indicates that the decision in Edwards v. Commonwealth, Ky., 500 S.W.2d 396 (1973), is applicable to this assigned error. However, the issue in Edwards was whether the eighteen-year-old defendant was entitled to be regarded as a juvenile offender so that his sentence of life without parole would be "cruel and unusual" punishment. Id., at 397. This Court in Edwards rejected the defendant's argument. Here again

the appellate issue, while tangentially touching upon the constitutionally of "life without parole," in no way approximates the question raised in this assignment of error.

In an unusual tactic, appellate counsel for the Commonwealth responds to this assignment of error by citing this Court's decision in Kahafer v. Commonwealth, Ky., 284 S.W.2d 678 (1955). The pertinent issue on appeal in Kahafer was whether the statute providing the punishment of life without parole for a person convicted of the rape of a female over twelve years of age was "discriminatory." The issue raised in Kahafer is certainly not comparable to the argument advanced by appellant in this assignment of error. Furthermore, the Kahafer decision was rendered by this Court in 1955 -- approximately seventeen years before the Supreme Court's landmark decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Obviously, the Kahafer decision is not even applicable to the assigned error, let alone dispositive of it.

In an effort to denigrate the merits of this assigned error, appellee analogizes the penalty of "life without parole" to the "federal narcotics statute which precluded the possibility of parole in certain cases, 26 U.S.C. §7237," and notes that the federal statute "was repeatedly upheld against attack on Eighth Amendment grounds"(Appellee's Brief, p. 51). Such an analogy is logically deficient for obvious reasons.

Although appellee cites three federal cases in which the no-parole provision of 26 U.S.C. §7237 weathered constitutional challenges concerning the "cruel and unusual" nature of the punishment, it should be noted that not one of those three cases involved a life sentence (see Appellee's Brief, p. 51). Even if a "no-parole" provision attached to a sentence of imprisonment for a term of years is constitutionally permissible, such

a holding would not dictate that a sentence of life imprisonment without parole would be without constitutional defect. To confine a person for ten years without opportunity for parole cannot be construed as comparable to sentencing a person to continual imprisonment for the remainder of his existence without even a possibility of parole. Accordingly, appellee's reliance on the precedents upholding the constitutionality of 26 U.S.C. §7237 is obviously misplaced.

In his initial brief, appellant catalogued numerous factual data, such as the almost universal rejection by state legislatures of "life without parole" as a punishment for the offense of rape (Appellant's Brief, pp. 37-46). This compilation of pertinent statistical and sociological evidence was marshalled to establish that the penal sanction of "life without parole," under the four-point test of Furman, is "cruel and unusual" punishment in violation of the Eighth Amendment to the United States Constitution. Appellee has declined to discuss any of these factors and has, instead, attempted to refute this assignment of error by relying on precedents which never addressed the statistical and sociological evidence advanced by appellant.

Recently, in Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975), the Sixth Circuit Court of Appeals held that sentences from ten to twenty years' imprisonment for possession of marijuana for sale and of twenty to forty years for sale of marijuana, imposed in response to the requirements of an Ohio statute, violated the federal constitutional prohibition against cruel and unusual punishment.

In the Downey case the Court emphasized that:

> While the authors of the Amendment may well have been primarily concerned with certain barbaric forms of punishment used in England and Europe prior to our independence,

> it has long been settled that all punishments are subject to the requirement that they be proportionate to the offense for which they are administered. Downey v. Perini, supra, at 1290.

In ascertaining whether Ohio's twenty-year minimum penalty upon conviction of selling marijuana constituted "cruel and unusual" punishment, the court in Downey examined the punishments imposed for the same offense in other jurisdictions and concluded that the Ohio penalty was "the most severe punishment for this offense imposed by any state." Id., at 1291.

Additionally, the court in Downey compared the Ohio marijuana penalties with the sanctions provided for various other crimes under Ohio law. As a result of this comparison, the court concluded that the minimum penalties for marijuana offenses "far exceed those [punishments] provided for other offenses, including crimes involving violence." Id., at 1291-1292.

A perusal of the decision in the Downey case establishes that the analysis advanced by appellant on this assignment of error employs the proper methodology and data for a correct determination of the issue presented.

In the case at bar, appellant was prejudiced by the jury's decision to sentence him to the "cruel and unusual punishment" of life without privilege of parole. Accordingly, this Court should hold "life without parole" to be an unconstitutional punishment and reduce appellant's sentence under count 8 of the indictment to life imprisonment.

IV.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION FOR A NEW TRIAL SINCE THE JURY'S VERDICT FINDING APPELLANT GUILTY OF THE OFFENSE OF RAPE WAS FLAGRANTLY AGAINST THE EVIDENCE.

Since appellant's initial brief presented a detailed analysis of the evidence of record as it pertained to the charged offense of rape, appellant will not reiterate those remarks, but will simply examine certain aspects of appellee's response to this error.

Interestingly, in his summary of the relevant evidence, appellee has ignored the defense theory of spontaneous ejaculation and its logical effect on the probative value of the semen stains found on the pants and undershorts which were taken from appellant after his arrest (Appellee's Brief, pp. 52-52; Appellant's Brief, p. 50-51).

After asserting that appellant "admitted that when he and Scott entered the Barnes' residence they found Francine in a robe," appellee noted that "appellant stated that they '. . .messed around in there. . .' before the boy and the father got home" (Appellee's Brief, p. 53). Although appellee indicates that such a statement will be found at page 842 of Volume VII of the Transcript of evidence, a reading of that page reveals no reference to any "messing around" at the Barnes' household before Mr. Barnes and his son arrived home. Furthermore, assuming arguendo that such a reference was made by appellant, the ambiguous term "messing around" can hardly be regarded as an admission of rape.

In another paraphrase of the evidence (Appellee's Brief, p. 53), appellee writes:

> In statements made to police officers by Scott, when asked if either he or Sloan had raped Francine Barnes, he replied ". . .I don't remember." (TE Vol. VII, pp. 822-828), and when asked if he had raped her, he stated emphatically that he did not (TE Vol. VII, p. 879).

This synopsis tends to confuse Wilmer Scott's actual remarks. According to Detective Duffy, Wilmer Scott, when asked on October 3, 1973 if he had raped Francine Barnes, replied, "I don't know" (T.E., Vol. VII, p. 824). Significantly, appellee neglected to include that on that same day, October 3, 1973, Scott was also questioned about appellant's involvement in the alleged rape. When asked if appellant had had sex with the girl, Scott answered: "If that nigger had touched that white girl I would have killed him" (T.E., Vol. VII, p. 823). Detective Duffy then asked, "Does that mean that you had sex with her?" To that inquiry, Scott responded, "I don't know but I know that nigger didn't or I would have killed him; they are just not my kind of people" (T.E., Vol. VII, p. 823).

It must be remembered that Scott during his interview with Duffy made no denial of having raped Francine Barnes. Scott's denial of having sex with Miss Barnes occurred when he was being questioned by the Commonwealth Attorney of Fayette County (T.E., Vol. VII, p. 879). Appellee in his summary of the evidence omitted that during the latter interview Scott said that he did not see appellant have sex with Miss Barnes nor did appellant indicate to Scott that he had engaged in sex with her (T.E., Vol. VII, p. 879).

Accordingly, this Court must reverse appellant's conviction of the offense of rape alleged in count 8 of the indictment and order a new trial on that charge.

V.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION FOR A NEW TRIAL SINCE THE JURY'S VERDICT FINDING APPELLANT GUILTY OF AIDING AND ABETTING VOLUNTARY MANSLAUGHTER UNDER COUNT NO. 9 OF THE INDICTMENT WAS FLAGRANTLY AGAINST THE EVIDENCE.

Although appellee has recounted numerous events from the record in an effort to demonstrate that appellant aided and abetted Wilmer Scott in the voluntary manslaughter of Rev. Barnes (Appellee's Brief, pp. 56-57), none of those events establish that appellant "in some way either by overt act or by expression or advocacy or sympathy encouraged the principal in his unlawful act." Warfield v. Commonwealth, Ky., 334 S.W.2d 913, 914 (1960).

Finally, appellant notes that the factual situation in Willoughby v. Commonwealth, Ky., 510 S.W.2d 11 (1974), a case cited by appellee (Appellee's Brief, p. 56), renders that opinion inapplicable to the case at bar. In Willoughby the person convicted as an aider and abettor to the voluntary manslaughter "started the fight" with the victim "[w]ith knowledge" that his associate, the principal, was armed. Since Willoughby initiated the affray with the knowledge that his armed colleague was present, this Court held that "[h]e should have known that deadly results would follow." Id., at 13.

In contrast to the situation in Willoughby, the evidence in the case at bar overwhelmingly establishes that Wilmer Scott, without encouragement or assistance from appellant, shot Rev. Barnes. In fact, appellant was not even in the room when Wilmer Scott allegedly killed Rev. Barnes.

Under the circumstances of the case at bar, there was no evidence that indicated appellant encouraged or assisted Scott with knowledge of Scott's intention to kill Rev. Barnes.

Accordingly, appellant's conviction under count 9 of the indictment must be reversed.

VI.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION FOR A NEW TRIAL SINCE THE JURY'S VERDICTS FINDING APPELLANT GUILTY OF AIDING AND ABETTING MURDER UNDER COUNTS 10 AND 11 OF THE INDICTMENT WERE FLAGRANTLY AGAINST THE EVIDENCE.

In view of the nature of appellee's response to this error, appellant will rest on the arguments and legal precedents cited in his initial pleading.

For the reasons set forth in his initial brief, appellant submits that since the evidence of record is insufficient to support appellant's conviction as an aider and abettor in the two killings alleged in counts 10 and 11, this Court must reverse appellant's convictions under those two counts of the indictment.

VII.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF COERCION AND DURESS.

In view of the nature of appellee's response to this error, appellant will rest on the arguments and legal precedents cited in his initial pleading.

By refusing to inform the jury of the legal principles of the defense of coercion and duress, the trial judge effectively denied appellant his constitutional right to a fair opportunity to present his legitimate affirmative defense to the charges. In view of the factual predicate for the tendered instruction, the trial judge's refusal to use the

instruction constituted reversible error of constitutional magnitude.

Accordingly, the trial judge committed reversible error by rejecting appellant's request that the jury be instructed on the affirmative defense of coercion and duress. For this reason, appellant's convictions under counts 8, 9, 10 and 11 must be reversed.

VIII.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY REFUSING TO GIVE THE DEFENSE-TENDERED INSTRUCTIONS PERTINENT TO THE APPELLANT'S STATUS AS EITHER A PRINCIPAL OR AS AN AIDER AND ABETTOR UNDER COUNTS 8, 9, 10 AND 11 OF THE INDICTMENT.

In view of the nature of appellee's response to this error, appellant will rest on the arguments and legal precedents cited in his initial pleading.

For the reasons set forth in his initial brief, appellant submits that appellant's convictions on counts 8, 9, 10 and 11 must be reversed.

IX.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY REFUSING TO GIVE THE DEFENSE-TENDERED INSTRUCTION ON REASONABLE DOUBT.

In view of the nature of appellee's response to this error, appellant will rest on the arguments and legal precedents cited in his initial pleading.

For the reasons set forth in his initial brief, appellant submits that the conviction in his case must be reversed and his case remanded.

X.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING THE DEFENSE'S OBJECTION TO THE INTRODUCTION OF VARIOUS COLOR PHOTOGRAPHS OF THE ALLEGED VICTIMS OF THE OFFENSES CHARGED IN THE INDICTMENT (PARTICULARLY, COM. EXS. 35, 52, 53, 54, 56, 57, AND 58) SINCE THESE PHOTOGRAPHS WERE NOT NECESSARY TO PROVE ANY CONTESTED RELEVANT FACT BUT WERE HIGHLY INFLAMMATORY AND PREJUDICIAL TO THE APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL.

In his response to this assignment of error, appellate counsel for the Commonwealth has made no attempt to address in specific terms the particularized objections to the individual photographs which appellant counsel enumerated in his initial brief (Appellant's Brief, pp. 78-81). Instead of addressing the probative value and necessity of each photograph to which appellant has objected, appellee argues that all the photographs were all without question admissible evidence without inflammatory repercussions. Such a carte blanche approach to the admission of obviously gory and prejudicial photographs flies in the face of this Court's holding in cases such as Salisbury v. Commonwealth, Ky., 417 S.W.2d 244 (1967), and Napier v. Commonwealth, Ky., 426 S.W.2d 121 (1968), both of which are cited by appellee (Appellee's Brief, p. 69). Certainly as recently as Henderson v. Commonwealth, 507 S.W. 2d 454, 460 (1974), this Court indicated that "it would be improper to admit photographs of a scene that had been substantially rearranged after the occurrence of the event which is the subject of the inquiry." The philosophy expressed in Henderson establishes that photographic exhibits are not per se admissible evidence regardless of their content and evidentiary value.

Accordingly, appellee has failed to establish that the photographs in question reached the level of 'relevant and necessary" evidence.

Because the photographs had no probative value, their introduction into evidence served only to inflame and prejudice the minds of the jurors against the appellant. Under this onerous burden, the jury could not have rendered a fair and impartial verdict. The prejudice inflicted by the trial court in admitting such evidence can only be purged by granting appellant a reversal of his conviction.

XI.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION TO ADMIT EVIDENCE OF WILMER ELVIS SCOTT'S PAST CRIMINAL CONVICTIONS AS SUBSTANTIVE EVIDENCE TO CORROBORATE SCOTT'S CONFESSION THAT HE ALONE WAS RESPONSIBLE FOR THE DEATHS OF REV. BARNES AND HIS TWO CHILDREN AND TO ESTABLISH SCOTT'S PROCLIVITY TO COMMIT VIOLENT CRIMES SUCH AS ASSAULT, ARMED ROBBERY, AND RAPE.

Appellee asserts that this Court's holding in Wilson v. Commonwealth, 303 Ky. 219, 197 S.W.2d 240 (1946), is dispositive of the question presented in this assigned error. Such a contention is without merit. The defendant in Wilson, supra, in an attempt to establish that another person had committed the offenses alleged in the indictment tendered to the trial court affidavits which recited specific instances of similar crimes allegedly committed by the third person. Furthermore, the affidavits alleged that the third person had the reputation of being a thief. Significantly, there was no evidence that the third person had actually committed the crimes alleged in the indictment. In contrast, Wilmer Scott had consistently admitted his guilt of the charged crimes in pretrial confessions. Since the jury may have had doubts concerning the accuracy of Scott's confessions, appellant needed the evidence of Scott's criminal record to provide the jury with additional evidentiary reinforcement of Scott's propensity to commit the charged crimes.

The Wilson decision in no way dealt with the corroborative value of evidence which demonstrated a disposition or propensity to commit similar crimes. For that reason it is readily distinguishable from the facts of the instant case.

Secondly, the Wilson decision stands for the principle that "a person charged with a crime may establish his innocence by showing another person committed it [the offense] without his aid or participation." Id., 197 S.W.2d at 241.

By denying appellant the opportunity to present evidence of Scott's past criminal convictions to corroborate and support Scott's confession to the various crimes, the trial court denied appellant his constitutional right to present evidence in his behalf.

Accordingly, appellant respectfully requests this Court to reverse his conviction by the court below.

XII.

THE COURT BELOW COMMITTED PREJUDICIAL ERROR BY DESIGNATING A LETTER WRITTEN BY THE COMMONWEALTH ATTORNEY AS A BILL OF PARTICULARS UNDER RCr 6.22, EVEN THOUGH SAID LETTER DID NOT ADEQUATELY INFORM THE APPELLANT OF ALLEGED FACTS ESSENTIAL TO THE PREPARATION OF HIS DEFENSE TO COUNTS 4, 5, 6 AND 7 OF THE INDICTMENT.

In his response to this assignment of error, appellee argues that the motion for a bill of particulars was filed after appellant was arraigned and, therefore, the denial of the motion was proper (Appellee's Brief, p. 74). Two points are significant here. First, at the pretrial hearing held on October 18, 1974, appellant's counsel moved the trial court to be allowed permission to file prearraignment motions, such as a motion for a bill of particulars, after arraignment. Counsel informed the trial court that, absent such an order, the defense would move to continue the arraignment of appellant and Wilmer Scott

to a later time so that the defendants "may fully exercise all of their rights prior to arraignment and entering of pleas" (T.E., Vol. I, Arraignment Hearing, hereinafter designated as A.H., pp. 3-4). The trial court acquiesced in the defense request (T.E., Vol. I, pp. 4-5).

As a result of that motion and ruling, appellee is precluded from invoking the discretionary aspect of RCr 6.22.

Secondly, if a motion for a bill of particulars is filed after arraignment, the trial judge must still grant the motion if "cause" is shown. RCr 6.22; White v. Commonwealth, Ky., 394 S.W.2d 770 (1965). In the case at bar appellant established adequate "cause" to support his request for a bill of particulars (Appellant's Brief, pp. 89-91).

Appellee's restrictive view of an accused's right to a bill of particulars is not supported by the law in this jurisdiction. In the past this Court has explicitly enunciated that "trial courts should be liberal in directing the filing of bills of particulars." White v. Commonwealth, Ky., 394 S.W.2d 770, 772 (1965). Indeed, "with the innovation of the abbreviated indictment the defendant should be supplied freely with details of the charge against him to prepare his defense" (emphasis added). James v. Commonwealth, Ky., 482 S.W.2d 92, 93 (1972). "If the indictment does not serve to inform the defendant sufficiently of the specific charges against him, a motion for a bill of particulars should be granted." Johnson v. Commonwealth, Ky., 514 S.W.2d 115, 119 (1974).

Denial of the discovery of these basic facts has resulted in unfair surprise at trial and in having significantly impeded appellant's preparation of his defense. Therefore, the trial court's refusal to grant appellant the discovery of these facts, constituted reversible error.

XIII.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY REFUSING TO GIVE THE ADMONITION REQUESTED BY THE DEFENSE THAT THE JURY SHOULD BE INFORMED THAT THE CHART/DIAGRAM USED BY THE PROSECUTOR IN HIS CLOSING ARGUMENT WAS NOT EVIDENCE BUT WAS ONLY ADDITIONAL ARGUMENT BY THE PROSECUTOR.

In his attempt to respond to appellant's argument, appellee has misconstrued the facts on which that argument is based. The chart/diagram to which appellant referred was not merely a floor plan of the Barnes' residence but a summary of the evidence to which the prosecutor referred in his closing argument. Because appellee has misconstrued the significance of the chart/diagram, his response to appellant's argument is not relevant. Consequently, appellant will rest on the arguments and legal precedents cited in his initial pleading.

For the reasons set forth in his initial brief, appellant submits that the conviction in his case must be reversed and the case remanded.

XIV.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR'S STATEMENT IN CLOSING ARGUMENT THAT "THE ONLY DECENT AND HUMANE THING" THAT APPELLANT COULD HAVE DONE WAS TO KILL WILMER SCOTT.

The appellee in his brief relies on Hunt v. Commonwealth, Ky., 466 S.W.2d 957 (1971), to support the prosecutor's closing arguments in the case at bar. The proposition that the only "decent and humane thing" appellant could have done was to have killed Scott, even if not intended as a statement of the law, is certainly not a "reasonable inference from the evidence." If not a statement of the law, it is surely an expression of the prosecutor's personal moral views. In no way was this proposition either a "reasonable comment on the evidence" or "a reasonable argument in response to matters brought up by

the defendant." Hunt, supra, cannot be cited as support for the argument that the prosecutor made.

The jury was likely to conclude that the thrust of the prosecutor's argument was that appellant had a legal duty to kill Scott to prevent further killings and that his failure to do so made him guilty of aiding and abetting Scott in the murders of the two children alleged in the indictment. As the Supreme Court of Appeals of West Virginia stated:

> [I]t was obvious error for the prosecutor to rebut defense counsel's argument by misstating . . .the law. . .State v. Starr, 216 S.E.2d 242 (W.Va. 1975).

Appellant reiterates that his conviction must be reversed because it is extremely probable that the jury based its findings of guilt on the principle introduced by the prosecutor that by not killing Scott appellant failed to do "the only decent and humane thing."

XV.

THE PROSECUTOR ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY COMMENTING TO THE JURY ABOUT APPELLANT'S DECISION TO REFRAIN FROM TESTIFYING ON HIS OWN BEHALF.

In view of the nature of appellee's response to this error, appellant will rest on the arguments and legal precedents cited in his initial pleading.

For the reasons set forth in his initial brief, appellant submits that the conviction in his case must be reversed and his case remanded.

XVI.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR'S ARGUMENT THAT THE JURY SHOULD IMPOSE THE MAXIMUM PENALTY FOR RAPE, LIFE WITHOUT PAROLE, TO PROTECT THE COMMUNITY FROM APPELLANT EVER COMMITTING SIMILAR CRIMES AGAIN.

Appellee cites Hamilton v. Commonwealth, Ky., 401 S.W. 2d 80 (1966), to support his contention that the prosecutor's argument was proper. Appellant's objection is to the prosecutor's arguing that life without parole must be imposed to protect the community from appellant ever committing similar crimes again. There was no such argument discussed in Hamilton; the arguments of the prosecutor in that case were general appeals to wipe out crime by imposing the severest penalty for offenses. Hamilton is not support for the proposition that a prosecutor can urge the jury to impose the maximum penalty to protect the community from the defendant.

Similarly, Tate v. Commonwealth, 258 Ky. 685, 80 S.W. 2d 817 (1935), did not deal with an argument referring to protecting the community from the person being tried and is not authority for the validity of such an argument.

Even if the argument made by the prosecutor was construed to urge the maximum sentence to protect society from crime in general, this Court has condemned such an argument in Dennis v. Commonwealth, Ky., 527 S.W.2d 8, 10 (1975). This Court in Dennis emphatically stated:

> A Commonwealth's Attorney should limit himself to reasonable comments upon the evidence and reasonable inferences which may be drawn therefrom. Id., at 10.

Because of the impropriety of urging the jury to give appellant the maximum sentence to protect society from him appellant's conviction should be reversed or, at the minimum, his sentence reduced.

XVII.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY REFUSING TO ADMONISH THE JURY CONCERNING THE LAW OF AIDING AND ABETTING TO REMEDY THE PROSECUTOR'S IMPROPER ARGUMENT.

In view of the nature of appellee's response to this error, appellant will rest primarily on the arguments and legal precedents cited in his initial pleading. However, appellant notes that a trial judge may admonish the jury concerning an erroneous statement by either the defense or prosecution at any time. RCr 9.54(2) "does not apply to admonitions." Webster v. Commonwealth, Ky., 508 S.W.2d 33, 36 (1974).

For the reasons set forth in his initial brief, appellant submits that the conviction in his case must be reversed and his case remanded.

XVIII.

THE TRIAL COURT ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY FAILING TO ACT SUA SPONTE TO PRECLUDE THE PROSECUTOR FROM MAKING AN ARGUMENT CALCULATED TO INFLAME THE PASSIONS AND PREJUDICES OF THE JURY.

Appellee contends that the prosecutor's argument on this point was merely "reasonable comment" and "reasonable inference" from the evidence. However, appellee's contention is supported by neither law nor logic.

The prosecutor's argument was a calculated appeal to the passions and prejudices of the jury. Such an argument serves no purpose but to inflame the jury.

It must be remembered that "[a] Commonwealth's Attorney may not so inflame the jurors with heinous details or consequences of a crime that they, solely out of passion and prejudice, will be led to return a verdict of guilty." Harness v. Commonwealth, Ky., 475 S.W.2d 485, 490 (1972).

Even though appellant's counsel did not object to this portion of the prosecutor's argument at trial, this Court should still review this allegation of error since all the prejudicial comments of the prosecutor resulted in "a manifest injustice." Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970).

Additionally, the Sixth Circuit Court of Appeals in United States v. Black, 480 F.2d 504 (6th Cir. 1973), held that even where no objection is made to a prosecutor's improper closing argument, an appellate court should intercede "where the error would seriously affect the fairness, integrity or public reputation of judicial proceedings." Id., at 507.

Accordingly, the trial judge's failure to exercise his judicial responsibility in the face of the prosecutor's patently improper and prejudicial argument is reversible error which taints the jury's verdict on all counts of the indictment. On the basis of this error, appellant's conviction should be reversed and a new trial ordered.

XIX.

THE CUMULATIVE EFFECT OF THE PROSECUTOR'S IMPROPER AND INFLAMMATORY COMMENTS DURING CLOSING ARGUMENT CONSTITUTED PREJUDICIAL ERROR WHICH DENIED APPELLANT DUE PROCESS OF LAW.

Appellee argues that if none of the previously discussed improper arguments were of prejudicial impact, then obviously the cumulative effect of those improper comments could not constitute reversible error. Appellee's contention overlooks the critical effect that the prosecutor's improper argument may have on the functioning of the jury.

As the Supreme Court has reiterated time and again, "[e]xercise of calm and informed judgment . . .[a jury's] members is essential to proper enforcement of law.: Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965)

citing Sinclair v. United States, 279 U.S. 749, 765, 49 S.Ct. 471, 73 L.Ed. 938 (1929). Highly prejudicial remarks uttered by the prosecutor jeopardize the jury's deliberative processes and hence infringe upon an accused's right to a fair hearing on the merits of the case. Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973).

The Supreme Court has recognized that a prosecutor's egregious misconduct in closing argument can amount to a denial of constitutional due process. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 1873, ____L.Ed.2d ____(1974). In the case at bar the totality of the prosecutor's improper argument, under the circumstances, did not comport with the "fundamental fairness" requirement of due process.

Accordingly, it is evident that the improper and inflammatory remarks delivered by the prosecutor during his closing argument substantially prejudiced appellant and deprived him of a fair trial.

XX.

THE CUMULATIVE EFFECT OF THE PRECEDING NINETEEN ERRORS SUBSTANTIALLY PREJUDICED APPELLANT'S TRIAL AND DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

In view of the nature of appellee's response to this error, appellant will rest on the arguments and legal precedents cited in his initial pleading.

Accordingly on the basis of the cumulative effect of the assigned errors, this Court must reverse appellant's convictions on all counts of the indictment and order a new trial.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the lower court be reversed.

Respectfully submitted,

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